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No. 81-1617

# in the Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

*Petitioner*

*vs.*

RAYMOND J. PLACE,

*Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF FOR RAYMOND J. PLACE

JAMES D. CLARK
*Attorney at Law*
FITZGERALD, TAYLOR & ZWICKY
1700 East Las Olas Boulevard
Suite 300
Fort Lauderdale, Florida 33301
(305) 462-4600 or 947-1014

## QUESTION PRESENTED

**Whether the Fourth Amendment prohibits the seizure of personal luggage by law enforcement authorities when such seizure is warrantless and without probable cause.**

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NO. 81-1617

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UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

RAYMOND J. PLACE,

*Respondent.*

## BRIEF FOR RAYMOND J. PLACE

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

1. On August 17, 1979, Robertson McGavock, an officer of the Dade County Public Safety Department in Miami, Florida, was on assignment at Miami International Airport (Tr. 8).[1] Officer McGavock was regularly assigned to Miami International Airport as a narcotics investigator. In an attempt to detect narcotics movement, Officer McGavock's duties included observing passenger movement on inbound and outbound airline flights. The National Airlines ticket counter was the site Officer McGavock selected to observe departing passengers on this date and it was at this site where he first observed the Defendant, Raymond J. Place (Tr. 8-9).

Officer McGavock was positioned in the line formed by unticketed passengers when by chance Raymond J. Place took up a position immediately behind him in the queue (Tr. 8-12). Although Officer McGavock had never seen or heard of Mr. Place, and even though he had no information "as to anything regarding any subject" relating to Raymond J. Place, Mr. McGavock directed his attention to Mr. Place when it appeared to him that Mr. Place was "scanning" the lobby area (Tr. 10 & 64). After standing in line in front of Mr. Place for approximately five minutes, Officer McGavock left the ticket line and joined John Facchiano, one of the three other law enforcement officers comprising the team of which Robertson McGavock was a member this day (Tr. 11). Once Officer McGavock left the ticket line he continued to watch Mr. Place from several locations until Mr. Place completed the purchase of his ticket. While Raymond J. Place was actually transacting his

[1] "Tr." refers to the transcript of the suppression hearing.

business with the airline ticket agent, Officer McGavock saw Mr. Place check two suitcases with name tags, purchase a ticket, and accept a ticket folder from the ticket agent with luggage claim stubs attached. Officer McGavock also watched the ticket agent point out to Mr. Place the direction of Concourse "F", the Concourse utilized by National Airlines for its flights (Tr. 11-14).

Once Raymond Place moved from the ticket counter area toward Concourse "F", Officer McGavock proceeded to a position paralleling the baggage conveyor belt transporting Mr. Place's two checked suitcases. From this vantage point, Officer McGavock observed the suitcases and noted the baggage claim stubs indicated a destination of La Guardia International Airport (Tr. 14-15). Once the two suitcases turned and passed out of sight, Officer McGavock directed his team member, Officer Facchiano, to go to the baggage loading area to look at the name tags on the two suitcases and determine what information they provided. Meanwhile, Officer McGavock continued to surveil Mr. Place and watched him perform what the trial court identified as a "curious ballet." When Officer Facchiano returned from the baggage area he told McGavock the name on the suitcases was "Place . . . P-L-A-C-E" (Tr. 16-18). At this juncture, personal contact was made with Mr. Place as he waited his turn to pass through the departing passengers security gate for Concourse "F". Officer McGavock admitted that he had no knowledge of Mr. Place being "involved in anything" and that personal contact was initiated because he *just had a feeling* (Tr. 35). This feeling was based upon his observance of two "unusual" activities—"[1] scanning the lobby and [2] looking over his shoulder for an unusual length of time while walking through the lobby for a great distance" (Tr. 32).

Officer Facchiano confronted Mr. Place first while Robertson McGavock stationed himself approximately 20 feet away. Prior to joining Officer Facchiano, McGavock watched Facchiano produce and show his credentials to Mr. Place (Tr. 19). Officer McGavock then joined his partner and Mr. Place and they moved to a position out of the line for departing passengers (Tr. 19). The initial contact with Mr. Place was for the purpose of conducting a "brief interview . . . to alleviate any of that suspicion we might have had" (Tr. 35). For the next several minutes, the authorities asked Mr. Place his name and had him produce and hand over his airline ticket and his drivers license (Tr. 36). The name given by Mr. Place, the name on the two suitcase name tags, and the name of the passenger indicated on the airline ticket corresponded without exception (Tr. 37-38). The contents of Mr. Place's hand-held bag were also viewed by Officer McGavock as Raymond J. Place looked inside it for identification (Tr. 64). Additionally, Mr. Place gave the two officers permission to examine his checked suitcases, but the officers noted that there was less than five minutes until departure of Mr. Place's flight and therefore allowed Mr. Place to depart (Tr. 22). Then, based upon Mr. Place's departing comment that he suspected the officers of being police officers when he saw them back in the lobby area, McGavock rushed to the baggage loading area to get all the information he could from the two name tags on Mr. Place's suitcases (Tr. 22-23).

When Officer McGavock arrived in the baggage area, he located the two suitcases and had 15-30 seconds to write down the identity information on the suitcase name tags (Tr. 55). The information was identical in all respects except Officer McGavock testified one name tag had the street number 1865 while the other had the

street number 1885 (Tr. 56). After taking steps to attach some significance to the address information, Officer McGavock communicated his suspicions about Mr. Place to Agent Gerard Whitmore of the Drug Enforcement Administration in New York (Tr. 27).

Officer McGavock asked Agent Whitmore to meet National Airlines Flight No. 136 at La Guardia International Airport and monitor Mr. Place's activities there and take "whatever action they might deem appropriate based on what I had told him" (Tr. 68). Officer McGavock told Agent Whitmore that he was basing his suspicions mainly on Mr. Place's actions in the lobby—staring and looking around closely at the people in the lobby and relating he had picked out 4 or 5 individuals as police officers (Tr. 67).[2]

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[2]The Drug Courier Profile was created in 1974 by DEA agents in Detroit. *United States v. Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976), *Aff'd*, 556 F.2d 385 (6th Cir. 1977). A similar profile was created by DEA Agent Paul Markonni in Atlanta. *United States v. Elmore*, 595 F.2d 1036, 1039 n. 3 (5th Cir. 1979). The Markonni profile consists of seven primary characteristics and four secondary characteristics. The primary characteristics are:

1) arrival from or departure to an identified source city;
2) carrying little or no luggage or large quantities of empty suitcases;
3) unusual itinerary, such as a rapid turnaround time for a very lengthy trip;
4) use of an alias;
5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags;
6) purchasing airline tickets with a large amount of small denomination currency; and
7) unusual nervousness beyond that ordinarily exhibited by passengers.

Noteworthy is the fact that at the time Mr. Place was confronted by McGavock and Facchiano in Miami, he fit characteristic (1) as did everyone else travelling to or from Miami by air that day, and characteristic (7), although Mr. Place's nervousness was not quantified as "beyond that ordinarily exhibited by passengers." Otherwise, Mr. Place appeared to have been an unlikely candidate for being a suspect for the Drug Courier Profile.

2. Some two and one-half to three hours later, Gerard Whitmore, an agent with the Drug Enforcement Administration, watched passengers deplane from National Airlines Flight No. 136 arriving at La Guardia International Airport from Miami (Tr. 21 & 75). Agent Whitmore was accompanied by another agent, Alfredo Iglesias, who also surveilled passengers exiting this particular flight (Tr. 75). Both Agent Whitmore and Agent Iglesias were specifically looking for a person previously described to them and identified for them as Raymond J. Place (Tr. 76). The surveilling of this particular flight and the individual monitoring of Raymond J. Place's activities were the direct result of a telephone

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(Footnote 2 Continued)

The secondary characteristics are:

1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport;
2) immediately making a telephone call after deplaning;
3) leaving a false or fictitious call-back telephone number with the airline being utilized; and
4) excessively frequent travel to source or distribution cities.

conversation between Whitmore and Officer Robertson McGavock (Tr. 104). In the telephone conversation between McGavock and Whitmore, Officer McGavock informed Agent Whitmore that a passenger identifying himself as Raymond J. Place was aboard National Flight No. 136. Agent Whitmore was also given a description of Raymond J. Place and was asked to meet Flight No. 136 when it arrived at La Guardia and to monitor Raymond J. Place when he deplaned (Tr. 104-105). The basis for the request by Officer McGavock that Agent Whitmore meet Flight No. 136 and monitor Mr. Place's activities was Officer McGavock's suspicions aroused by Mr. Place's activities while at Miami International Airport prior to boarding Flight No. 136. Agent Whitmore had no previous knowledge of Raymond J. Place other than that he received from Officer McGavock (Tr. 106). Agent Whitmore planned to observe Raymond J. Place and determine in his mind if Mr. Place was, indeed, acting suspicious (Tr. 106).

Raymond J. Place was among the first 25 or 30 passengers deplaning Flight No. 136 (Tr. 106). Agent Whitmore observed Mr. Place "looking around, and thought such activity was extremely unusual" (Tr. 108). However, Agent Whitmore admitted that had he not been specifically seeking out and then observing Mr. Place, his attention may not have been drawn to this particular passenger (Tr. 109).

According to Agent Whitmore, surveillance of Mr. Place was not continuous, but was voluntarily broken off between the deplaning area and the baggage claim area. During this interim period when Mr. Place was not being surveilled, Agent Whitmore positioned himself

outside the railing surrounding National Airlines baggage claim area (Tr. 77). Shortly after taking up this position, Agent Whitmore observed Mr. Place approach the baggage claim area from the direction of an adjoining baggage claim area. Once Mr. Place arrived at the designated baggage claim area, Agent Whitmore continued to be suspicious because of Mr. Place's scanning of the area (Tr. 77-78).

When National Airlines Flight No. 136 baggage began arriving, Raymond J. Place proceeded to collect his two suitcases after they appeared on the carrousel (Tr. 78-79). Mr. Place then presented the security person with his baggage claim stubs and began to walk away from the National Airlines baggage area toward the TWA baggage area (Tr. 79-80). Agents Whitmore and Iglesias exchanged glances and head nods and then proceeded to follow Mr. Place to TWA's baggage claim area. When Mr. Place reached the TWA baggage area, he placed a call on a direct-line limousine service telephone (Tr. 83). The decision to approach Mr. Place for purposes of interviewing him was made by Agent Whitmore when he observed Raymond J. Place complete this limousine telephone call (Tr. 83). Agent Whitmore testified that the purpose of the interview was to have Mr. Place explain his suspicious activity (Tr. 127).

When the investigatory stop was initiated Agent Whitmore produced his own credentials and identified himself as a federal narcotics agent to Mr. Place. Agent Whitmore testified that Mr. Place asked him "why we [Whitmore and Iglesias] had stopped him" (Tr. 84). In response to Mr. Place's question, Agent Whitmore informed him that information had been received from

the Dade County Public Safety Department, and that "based on observations that Agent Iglesias and [Whitmore] had made at the airport, that [Whitmore] was under the belief that there was a possibility that he was carrying narcotics" (Tr. 84). Mr. Place was next asked whether the luggage he had with him belonged to him, and then he was asked to produce identification and his airline ticket (Tr. 85). Mr. Place was never asked to explain why he was scanning the area or why he appeared to be nervous, even though the purpose of the interview was to allow him an opportunity to offer such explanations (Tr. 126-127). The airline ticket and the drivers license produced by Mr. Place confirmed the information already communicated to the agent by Officer McGavock. Indeed, Agent Iglesias ran a NCIC computer check utilizing the information provided by Mr. Place's drivers license and determined that there was no basis for holding Mr. Place for further questioning (Tr. 92).

The agents seized the two suitcases possessed by Mr. Place and acknowledged by Mr. Place to belong to him. This seizure was without the consent of Mr. Place (Tr. 128). Agent Whitmore also admitted his intention to take custody of the two suitcases regardless of whether or not Mr. Place consented to the seizure (Tr. 129).

3. The Court of appeals was particularly disturbed by the "high-handed" procedure which Agents Whitmore and Iglesias utilized when seizing Mr. Place's luggage (Pet. App.A, 18a-19a). The agents lied to Mr. Place by informing him that they were taking his luggage to a federal judge when, in fact, the agents were taking Mr. Place's personal effects to J.F.K. Airport, where they intended to subject the luggage to a so-called "sniff search" by a dog trained to detect controlled substances.

Also, the court of appeals was certainly aware in reaching its decision that other circuits, which had been called upon to determine this same legal issue, had relied upon this Court's decision in *United States v. Van Leeuwen*, 397 U.S. 249 (1970). However, the court of appeals likewise was aware that not only were the facts supporting this Court's decision in *Van Leeuwen* clearly distinguishable from the facts present in the case at hand, but also, was aware, and took efforts to point out, that the cases emanating from the other circuits were factually distinguishable in several critical ways from Mr. Place's situation (See Pet. App. A, 20-a21a).

In reversing the judgment of conviction, the court of appeals succinctly summarized its position by stating:

> It is simply not a 'temporary detention for investigative purposes' when DEA agents seize suitcases against the owner's will at an airport, load them into the trunk of a car, drive to an undisclosed (indeed, misrepresented) destination, subject the luggage to secret tests never disclosed to the owner, and make no attempt to keep the owner informed as to the progress or likely duration of the investigation. Nothing in *Terry* justifies such a broad intrusion into a traveler's Fourth Amendment rights (*id.* at 21a).

## SUMMARY OF ARGUMENT

The basic premise of the Government's argument is that the Fourth Amendment does not require that searches or seizures be based on probable cause. A review of this Court's early decisions requires that the Government's argument be rejected. The protections of the Fourth Amendment are applicable not only to the privacy interests necessarily invaded by searches, but also to the property interests violated by seizures.

Historical precedent which has established the probable cause requirement of the Fourth Amendment as a fundamental right, was recently reconfirmed by this Court's decision in *United States v. Ross*, ____ U.S. ____, 102 S.Ct 2157 (1982). Probable cause continues to be a prerequisite to any seizure employed for the purpose of conducting a search of items of personalty.

The Government also urges this Court to expand the exception to the probable cause requirement which was first expressed by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The expansion of the so-called *Terry* exception to the probable cause requirement which is urged by the Government is not consistent or compatible with this Court's decisions. This Court continues to jealously guard the "narrow scope" of the *Terry* exception and to sanction nothing other than extremely brief and localized seizures of persons and not property. *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

Thoughtful reflection about the forseeable consequences of allowing seizures such as the one which is the subject of this case, leads only to the conclusion

that seizures of items of personalty directly from an individual's possession are substantially more offensive to Fourth Amendment rights than those ever contemplated by *Terry* or its progeny.

## ARGUMENT

### THE WARRANTLESS SEIZURE OF RAYMOND PLACE'S LUGGAGE BY LAW ENFORCEMENT AUTHORITIES ACTING WITHOUT PROBABLE CAUSE VIOLATED FUNDAMENTAL FOURTH AMENDMENT PROTECTIONS.

#### A. Fourth Amendment Protections Extend To Both Searches And Seizures.

In its brief, the Government presents for this Court's consideration an interpretation of the Fourth Amendment which must initially be viewed as *novel* and thereafter rejected as *untenable.* At the core of the Government's argument is the statement that "[b]y its terms, then, the Fourth Amendment does not require that searches or seizures be based on probable cause" (Br. 15). Initial support for this assertion is sought through the presentation of a whittled down version of the Fourth Amendment in which the warrant and probable cause requirements have been pared away.[3] This essential theme of the Government's argument is without historical

[3]The government states that "[t]he substantive command of the Fourth Amendment prohibits 'unreasonable searches and seizures' but does not further define the term 'unreasonable' " (Br. 15).

or contemporary precedent and is an attempt to ignore—indeed delete—well established and jealously guarded fundamental rights guaranteed by the Fourth Amendment. *See, Katz v. United States*, 389 U.S. 347 (1967); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Mincey v. Arizona*, 437 U.S. 385 (1978); *United States v. Ross*, ____ U.S. ____, 102 S.Ct. 2157 (1982).

The depth and breath of Fourth Amendment protections were recognized and established by straight forward language in the case of *Boyd v. United States*, 116 U.S. 524 (1886). Justice Bradley, rendering the opinion of the Court, stated:

> It is not the breaking of [an individual's] door, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . *id.* at 532.

In *Boyd*, a statute which compelled the production of incriminating documentary evidence was being examined by this Court. The statute which was under scrutiny by this Court required the production of documentary evidence absent a showing of probable cause. Utilizing Lord Camden's discussion of indiscriminant seizures in *Entick v. Carrington*, 19 How. St. Tr. 1029, Justice Bradley reflected that "[in] order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent

history of the controversies on the subject, both in this country and in England." The subject of such reflection was the practice of issuing writs of assistance which placed "the liberty of every man in the hands of every petty officer." By analogizing the statute under security in *Boyd* to the writs of assistance, and by identifying both as illegal and unconstitutional practices, the early precedents of this Court clearly emphasized the Fourth Amendment's protection against the seizure of property without probable cause. *See also, Weeks v. United States*, 232 U.S. 383 (1914); *Gouled v. United States*, 255 U.S. 298 (1921); *Taylor v. United States*, 286 U.S. 1 (1932).

The tenor of this Court's early Fourth Amendment decisions is accurately reflected by the following statement in *Weeks v. United States, supra* at 344:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the Courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The probable cause requirement has always been a focal point for this Court's Fourth Amendment decisions, since it is the absence of probable cause which leads to stealthy encroachments upon the Fourth Amendment rights of the individual.

The Constitutional principles ennunciated in this Court's early decisions defining the depth and breath of Fourth Amendment rights—namely, that the protections of the Fourth Amendment are applicable not only to the privacy interests necessarily invaded by searches, but also to the property interests violated by seizures—were firmly established in *Gouled v. United States, supra* at 304:

> [S]uch rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or well-intentioned, but mistakenly over-zealous, executive officers.

The argument which is presented by the Government in its brief ignores the historical decisions of this Court which have established the probable cause requirement of the Fourth Amendment as a fundamental right. Once selecting a course which blindly ignores the logic and reasoning of this Court's earlier Fourth Amendment decisions, the Government's argument focuses on this Court's decisions which have allowed searches and seizures in the absence of probable cause. Not

unexpectedly, the Government's argument urges an expansion of the exception to the general rule of probable cause and thereby implicitly promotes the replacement of the probable cause requirement with the discretionary subjective sense of suspicion "of every petty officer."

This Court's recent decision in *United States v. Ross, supra*, unequivocally confirms a continued dedication to the Fourth Amendment's probable cause requirement. The Court's commitment to the probable cause requirement leaves no doubt that the argument put forth by the Government must be rejected as untenable. Indeed, the Government acknowledges that probable cause continues to be a prerequisite for searches directed at so-called areas of reduced privacy expectations (Br. 16 n. 9). "[T]he general rule [is] that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan v. Summers*, 452 U.S. 700 (1981). Exceptions to the probable cause requirement are few.[4] The Government attempts to create a new exception

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[4]One example is an inspection or administrative search, commonly conducted by health, fire, or safety inspectors pursuant to a governmental regulatory scheme. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (Upheld inspection search without probable cause that a particular dwelling violated a housing code). A second type of search permitted without probable cause is the border search. *United States v. Ramsey*, 431 U.S. 606 (1977); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The third and potentially most far-reaching type of search excepted from the probable cause requirement is the "stop and frisk" under which a law enforcement authority may seize a person if there exists a reasonable and articulable suspicion that such individual is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968). The administrative and border search exceptions are inapplicable to this case; the *Terry* exception is discussed *infra*.

to the probable cause requirement by continuing its effort to create an unprecedented and fictitious dichotomy between searches and seizures. The Government reasons that "[b]ecause the principle Fourth Amendment interest in a bag or package is in the privacy of its contents, this distinction between searches and seizures is particularly marked in the area of seizures of effects (Br. 22). However, this Court's decisions in *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), *Colorado v. Bannister*, 449 U.S. 1 (1980) and *United States v. Ross*, *supra*, gut the very foundations of such argument. *Ross*, *Sanders* and *Chadwick* are cases dealing with the seizures and searches of personal luggage *vis-a-vis* the probable cause requirement. In each of these cases, this Court unequivocally reaffirms the principle that probable cause is a prerequisite to a seizure employed for the purpose of conducting a search of items of personalty, and this is true whether such items are found in a car, arrive at a train station, or are picked up at an airport.

### B. The *Terry* Exception To The Fourth Amendment's Probable Cause Requirement Is Not Applicable To Seizures Of Items Of Personal Luggage.

In the landmark decision of *Terry v. Ohio*, 392 U.S. 1 (1968), this Court created a narrow exception to the probable cause requirement. Such exception permitted a brief "on-the-spot" investigative stop of an individual by law enforcement authorities under circumstances where probable cause did not exist but the officers were armed with sufficient specific articulable facts to

justify a reasonable suspicion that the person stopped was in engaged in criminal activity. *See also, Delaware v. Prouse*, 440 U.S. 648 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1967); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968). The creation of such exception was justified by concluding that when balancing the public's interest in protection from crime against the individual's right to security of his person and effects, such intrusion was so minimal *vis-a-vis* traditional arrests and seizures that limited leeway should be permitted in the interest of law enforcement. *Dunaway v. New York*, 442 U.S. 200, 209 (1979).

> The narrow intrusions involved in those cases [*Terry* and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause [Citation omitted] only because these intrusions fell far short of the kind of intrusion associated with an arrest. *id.* at 212.

Indeed, this Court in *Brignoni-Ponce, supra*, rejected the Government's argument which urged an expansion of the exception to the general rule of probable cause. The Court stated:

> The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent*

*or probable cause. United States v. Brignoni-Ponce*, 422 U.S. at 881 (1975) (Emphasis added).

Furthermore, the expansion of the probable cause exception urged by the Government in *Brignoni-Ponce* was significantly less than that being proposed in this case.

Hand-in-hand with the suggestion that seizures are less intrusive than are searches, the Government asserts that "[b]ecause the temporary seizure of luggage is so much less intrusive than that of a person, the point at which prolongation of the seizure becomes unreasonable in the absence of probable cause is considerably more distant" (Br. 26). These assertions cannot withstand thoughtful examination. First, an ongoing traveler assumes that his suitcases will travel with him. *See, United States v. McCain*, 556 F.2d 253 at 255 (5th Cir. 1977).[5] Therefore, a seizure of a traveler's luggage is a coextensive seizure of the traveler. A traveler's luggage cannot be detained within the parameters of *Terry* unless the traveler is detained; therefore, contrary to the Government's conclusion, such a seizure is arguably more intrusive than the so-called *Terry* stop.

Second, when law enforcement authorities seize an item of personalty in the absence of probable cause, the owner of such item is forced to select a course of action which is Constitutionally repugnant; namely, the owner must consent to an on-the-spot search based

[5]Even the "ubiquitious" Agent Whitmore agrees with this statement (Tr. 131).

on less than probable cause or, in the alternative, be detained for an indeterminate period of time.

In this same vein, the Government has the audacity to suggest that it would have been unreasonable in the particular circumstances of this case to bring a dog to La Guardia Airport for the purpose of conducting an immediate "sniff search" in the event Mr. Place's bags were detained. The Government has even implicitly suggested that when balancing the individual's right to be free from arbitrary interference by law enforcement officers against governmental interests in ferreting out crime, factors for consideration include the following: 1) that the DEA does not maintain a drug detecting dog program, 2) that a dog is often unnecessary in the investigations which are commenced, and 3) that the cost of training a dog and stationing a dog and handler at an airport such as La Guardia would be totally out of proportion to the amount of use they would receive (Br. 32-33). These factors are apparently considered by the Government to tip the scales in its favor when balanced against an individual's Constitutional right to be free from arbitrary interference by law enforcement authorities. Additionally, the Government offers an excuse for its conduct by stating "the detention here was not extended any longer than necessary" (Br. 31). In fact, the rationale for the narrowly defined intrusions involved in *Terry* and its progeny is not whether a detention was extended any longer than necessary. An excuse is warranted in the instant case solely because of the fact that Mr. Place's personal luggage was seized on a mere suspicion, was transported to a secured search area about which he was misinformed, was not told when his personal luggage would be returned, and he

was, for all intents and purposes, rendered immobile as a traveler.

The Government also seeks support for its argument which urges an expansion of the *Terry* exception by citing *United v. Klein*, 626 F.2d 22 (7th Cir. 1980) and other courts of appeals which have followed *Klein*. *United States v. Martell*, 654 F.2d 1356 (9th Cir. 1981); *United States v. West*, 651 F.2d 71 (1st Cir. 1981); *United States v. Viegas*, 639 F.2d 42 (1st Cir.1981). In *Klein*, which is the seminal case giving rise to the conflict between the various courts of appeals, the Court found the principles expressed by this Court in *United States v. Van Leeuwen*, 397 U.S. 249 (1970) to be controlling. Such is not the case. First, this Court's decision in *Van Leeuwen* was specifically limited to the facts of that case. Such a limitation severely restricts the *Van Leeuwen* decision as precedent. *See, e.g., Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

Second, in *Van Leeuwen* the detention which was the focal point of this Court's decision, was directed at two packages left with a postal clerk for first class mailing. The postal clerk who accepted the two packages for mailing became suspicious and informed a policeman of his suspicions about the packages. The two packages were then detained while the officer conducted an investigation in an attempt to establish probable cause supporting the issuance of a warrant authorizing a search of the two packages. A critical factor distinguishing the detention of the two packages in *Van Leeuwen* from the seizures in *Klein, Martell, West, Viegas*, and the instant case, is that in *Van Leeuwen* probable cause to search the packages was established through means independent of the packages themselves; whereas, in

*Klein* and its followers, and in this case, probable cause to search the pieces of luggage was established by investigative means directed solely at the detained pieces of luggage. In *Van Leeuwen* the packages were detained so that they could be searched once the authorities had obtained a warrant based on probable cause ascertained independently of the detention. In this case, Mr. Place's personal luggage was seized solely for the purpose of attempting to establish probable cause for its search.

Additionally, the detention of the packages in *Van Leeuwen* did not precipitate a correlative detention of their owner; whereas, such was not the case here as evidenced by Mr. Place's immobilization as a traveler. Indeed, this Court has recognized that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Katz v. United States, supra* at 350.

Also, in *Klein* and its followers, the courts failed to recognize the inherent differences existing between detentions of persons and seizures of items of personalty. A person can be stopped without being arrested. In the event a person is arrested, probable cause is required. When property is taken—regardless of whether it is called a detention or a seizure—the owner is immediately and absolutely dispossessed, and that is the type of seizure the Fourth Amendment requires to be based upon probable cause. While seizures of persons can be viewed on a sliding scale, seizures of property are subject to an absolute and objective standard.

In *Dunaway v. New York, supra* at 210, this Court reaffirmed that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." The "narrow scope" of the exception to the general rule requiring probable cause is certainly not what the Government is urging in this case. Accordingly, the warrantless seizure of Raymond Place's luggage by law enforcement authorities cannot be justified absent probable cause.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

James D. Clark
*Attorney at Law*
FITZGERALD, TAYLOR & ZWICKY
1700 East Las Olas Blvd.
Suite 300
Fort Lauderdale, Fla. 33301-2497
(305) 462-4600 or 947-1014